



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** DeVac, Inc.

**File:** B-224348.2

**Date:** September 3, 1986

---

### **DIGEST**

1. Where an invitation for bids requires the submission of descriptive literature to establish conformance of the product offered with the material specifications of the solicitation, a bid must be rejected as nonresponsive if the literature submitted evidences nonconformity with the specifications.
2. The inadequacy of submitted descriptive literature may not be cured by explanations offered after bid opening under the fundamental principle of sealed bidding that responsiveness must be determined on the basis of the bid as submitted.

---

### **DECISION**

DeVac, Inc. (DeVac), protests the rejection of its bid as nonresponsive by the Veterans Administration (VA) under invitation for bids (IFB) No. 656-86-161 for the replacement of windows at the Veterans Administration (VA) Medical Center at St. Cloud, Minnesota. We deny the protest.

This procurement is a readvertisement of one which was canceled because of ambiguous specifications. In fact, the contracting officer states the VA has in the past encountered problems with contractors planning to install windows which did not comply with specification requirements. In order to have information concerning the product each bidder was offering available at the time bids were submitted and evaluated, rather than after contract award, the solicitation contained requirements for test results and literature descriptive of the window unit the bidder proposed to furnish.

036635

Following the title page of the solicitation was a sheet signed by the contracting officer, entitled "REQUIRED BIDDING INFORMATION." In it, the contracting officer advised bidders:

"I want to make it very clear as to what is required for test results and descriptive literature. I suggest you very carefully read the Aluminum Window Specification Section 08520, Paragraph 3.5. Please take special note that for each type of window offered, that test results from on-site performance tests must be provided. [Emphasis in original.] . . . Also, a requirement for fully descriptive literature has been included in this readvertisement, see Instructions, Conditions and Other Statements of Bidders, FAR 52.214-21, Descriptive Literature. If the windows you are proposing are in any way altered to meet the specifications, please notate on the descriptive literature drawing what is being altered to meet the specifications." [Emphasis added.]

"Please comply with the testing and descriptive literature requirements. Bids that do not fully comply cannot be considered responsive." •

On the Standard Form 1442, Solicitation, Offer, and Award, also a part of the IFB, was another note reminding bidders that "for a bid to be responsive to this solicitation," the bidder must supply with its bid the test results and descriptive literature required by the solicitation. Bidders were warned in the "Descriptive Literature" clause that the failure of the literature to show that the product offered conformed to the requirements of the solicitation would require rejection of the bid.

The IFB required with respect to the type of window at issue here that it be a "factory fabricated 1-inch hermetically sealed glass unit consisting of two panes of glass separated by a dehydrated air space." With regard to testing, Paragraph 3.5 of Specification Section 08520 provided, in part:

"All bidders shall provide with their bids the test results from one installation where on-site performance test was performed. Test shall have been conducted by a certified testing laboratory."

Six bidders responded to the IFB. Three bids were rejected because of unacceptable test reports. DeVac's bid was rejected for two reasons. The first basis of rejection was that DeVac's test report was unacceptable because Briggs Associates, Inc., the testing company for DeVac's windows, stated in its report that "the [air and water infiltration] tests were performed using equipment supplied by others; therefore, Briggs Associates, Inc. does not assume any responsibility for the calibration of said equipment." The contracting officer concluded that this statement qualified the test results and that DeVac therefore failed to satisfy the requirement for a test "conducted by a certified testing laboratory." Second, the contracting officer found that DeVac's literature descriptive of its model 760 double hung (DH) window unit depicted 5/8-inch thickness insulated glass, not the 1-inch insulated glass required by the specifications. The window thickness is critical to obtaining the needed insulation.

By letter of May 22, 1986, received by DeVac on May 29, the VA advised DeVac of the rejection of its bid and the reasons for the rejection. On May 22, DeVac was also sent a copy of the VA's notice of award to W.L. Hall Company. On May 29, DeVac protested to the VA the rejection of its bid and the award. On June 12, DeVac sent a more specific statement of its protest to the VA and on June 16, filed a protest with our Office. The VA declined to respond to DeVac's agency-level protest because of DeVac's subsequent protest to our Office. By notice dated June 16, we initially dismissed as untimely DeVac's protest because we were unaware of the agency-level protest. We reinstated the protest on June 21, after DeVac asked for reconsideration on the basis that it had filed a timely agency-level protest.

We previously have affirmed decisions by our Office to dismiss protests where a protester does not present in its protest the relevant facts, for example, that its protest to our Office is an appeal of an agency denial of its agency-level protest, which establishes the timeliness of its protest. See Marco Crane & Rigging Co.--Request for Reconsideration, B-220618.2, Nov. 27, 1985, 85-2 C.P.D. ¶ 612; Global Crane Institute--Request for Reconsideration, B-218120.2, May 28, 1985, 85-1 C.P.D. ¶ 606. While we initially dismissed DeVac's protest on the basis of its protest letter which failed to indicate that DeVac had filed a protest with the VA, we do not think the cases cited above require the affirming of our dismissal of the protest in these circumstances. We do not think that DeVac should be

deprived of a decision on the merits of its protest when it in fact initially filed timely protests with both the agency and our Office.

DeVac objects to the contracting officer's conclusion that DeVac's bid was nonresponsive because it failed to offer a 1-inch thick insulated glass window as specified by the IFB.

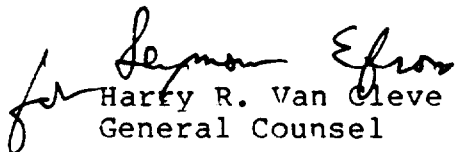
It is well-settled that an agency properly rejects a bid as nonresponsive where the bidder submits descriptive literature as required that shows that the product it is offering does not conform to the material specifications set forth in the IFB. Harnischfeger Corp., B-220036, Dec. 14, 1985, 85-2 C.P.D. ¶ 689. This is because of the fundamental principles of sealed bidding that responsiveness concerns a bidder's unequivocal offer to provide supplies or services in total conformity with the material terms and conditions of the solicitation, and that responsiveness must be determined on the basis of the bid as submitted. Continental Telephone of California, B-213255, Apr. 17, 1984, 84-1 C.P.D. ¶ 428. Thus, even if the offered product in fact possesses the required features, bid rejection is required when the literature does not clearly show conformance with the requirements. Harnischfeger Corp., B-220036, supra. We will not disturb the agency's determinations concerning the adequacy of required descriptive literature absent a clear showing of unreasonableness, abuse of discretion, or a violation of procurement statutes and regulations. Washex Machinery Corp., B-214591.2, Sept. 25, 1984, 84-2 C.P.D. ¶ 352.

Here, we cannot object to the agency's determination that the descriptive literature submitted by DeVac failed to show that the model it intended to offer met the 1-inch unit requirement. The test report submitted with DeVac's bid was of its model 760 DH window. In addition, DeVac submitted descriptive literature which included a schematic drawing of that model window. The only indication of the thickness of this model was this drawing. The drawing, clearly labeled as Model 760 DH, is stated as drawn in a 1/4-inch scale which when measured shows a 5/8-inch insulated glass window, not the required 1-inch thickness. DeVac does not dispute that the descriptive literature only depicts the 5/8-inch insulated glass. Nowhere in DeVac's bid was any notation as to whether, or how, it proposed to alter the window to achieve a 1-inch thickness. Accordingly, we find that the contracting officer properly rejected DeVac's bid as nonresponsive. Harnischfeger Corp., B-220036, supra.

DeVac argues that the contracting officer should have considered its representations made orally and in writing after bid opening, but prior to award, that DeVac would furnish 1-inch glass. Although DeVac furnished a post-bid opening statement that it would furnish 1-inch glass, this is of no consequence because a nonresponsive bid may not be cured by explanations offered after bid opening. E.I. duPont de Nemours Co., Inc., B-208263, Dec. 27, 1982, 82-2 C.P.D. ¶ 578.

Since we find that the contracting officer properly found DeVac's bid nonresponsive to the 1-inch glass thickness requirement, we need not address the validity of the VA's other basis for rejection of DeVac's bid.

We deny the protest.

  
for Harry R. Van Cleve  
General Counsel